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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

On Appeal from the Court of Errors and Appeals of New Jersey.

BRIEF OF APPELLANTS.

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Newark, N. J.,
April, 1942.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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IN THE

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No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BRIEF OF APPELLANTS.

I.

The Opinions of the Courts Below.

The opinion of the Supreme Court of New Jersey is reported in 19 N. J. Misc. 322, and appears in the Record at page 65.

The opinion of the Court of Errors and Appeals of New Jersey is reported in 127 N. J. L. 239, and appears in the Record at page 70.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is September 19, 1941, (R. 74). The date upon which application for

appeal was presented was December 15, 1941 (R. 79). The Order allowing Appeal was dated December 16, 1941 and filed December 20, 1941 (R. 79).

2. The statutory provisions sustaining jurisdiction over this appeal appear in Title 28, U. S. Code, Section 344 (a), (Act of February 13, 1925, c. 229, Section 237, 43 Stat. 937) and in Title 28 U. S. Code, Sections 861 (a) and 861 (b) (Act of January 31, 1928, c. 14, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466).

3. Decisions which sustain the jurisdiction of the Supreme Court of the United States to review this cause upon appeal are: *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513 (1936); *United States* v. *Bekins*, 304 U. S. 27 (1938); *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819); *Ogden* v. *Saunders*, 12 Wheat. 213 (1827); *Baldwin* v. *Hale*, 1 Wall. 223 (1863); *Baldwin* v. *Bank of Newbury*, 1 Wall. 234 (1863); *Denny* v. *Bennett*, 128 U. S. 489 (1888); *International Shoe Co.* v. *Pinkus*, 278 U. S. 261 (1929); *Wolff* v. *New Orleans*, 103 U. S. 358 (1880); *Louisiana* v. *Pilsbury*, 105 U. S. 278 (1881); *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934); *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426 (1934); *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935).

III.

Statement of Case.

The question presented for determination by this appeal is whether the State of New Jersey has the power to enact a municipal insolvency act which provides for a compulsory composition of pre-existing contracts.

The appellants are owners, in the aggregate of $105,000.00 in principal amount, of unpaid bonds of the City of Asbury Park, New Jersey, to which are attached $889.80 of unpaid interest coupons. These bonds were issued in the year 1929 or 1930, bore interest at the rate of five and three-quarters per cent. or six per cent. per annum, and were due and payable in the years 1933, 1934, or 1935 (R. 4-7). In 1933 the compulsory composition statute here challenged was enacted. Pursuant to that statute, proceedings were instituted on February 1, 1936 for the adoption of a refunding plan for the City of Asbury Park (R. 10). On April 29, 1938, a plan was approved by the New Jersey Supreme Court, and was put into operation on June 15, 1938 (R. 10). Under the terms of the plan, the City of Asbury Park agreed to pay interest on the bonds at the contract rate until December 31, 1933, to pay interest for the years 1934, 1935, 1936 and until December 1, 1937 at the reduced rate of three per cent. per annum, and to issue new bonds dated December 1, 1937, maturing in 1966, over thirty years after the maturities of the old bonds, and bearing interest at the rate of four per cent. per annum to holders in exchange for their old bonds (R. 11, Schedule A, R. 12).

This appeal brings up for review the judgment of the Court of Errors and Appeals of New Jersey sustaining the validity of the New Jersey statute, Article 7 of Chapter 27 of Title 52 of the Revised Statutes, enacted June 27, 1933,* providing for a composition of claims of creditors of municipalities within the state, as against the objections of the appellants that the statute violated the Constitution of the

* Article 7 of Chapter 27 of Title 52 of the Revised Statutes is printed as an Appendix to this Brief.

United States in that it impaired the obligation of contracts, deprived appellants of due process of law, denied them the equal protection of the laws and abridged the privileges and immunities of appellants as citizens of the United States.

Suit was originally instituted in the Supreme Court of New Jersey by Faitoute Iron & Steel Company, and Moses W. Faitoute. During the course of the proceedings Moses W. Faitoute died and appellants, The Howard Savings Institution, Florence W. Faitoute, Claire Faitoute White, and William G. Carter, as executors of the Estate of Moses W. Faitoute, were substituted as parties plaintiff.

The complaint filed by appellants in the New Jersey Supreme Court is in four counts and seeks to recover on unpaid bonds and interest coupons issued by appellee. It alleges in the First, Second and Third Counts that the corporate appellant, Faitoute Iron & Steel Company holds in the aggregate $100,000.00 principal amount of unpaid bonds to which are attached $616.50 of unpaid interest coupons. A judgment was sought on these counts in these amounts, plus interest at the legal rate from the respective due dates of the bonds and coupons. The Fourth Count alleges that the individual plaintiff, Moses W. Faitoute, holds $5,000.00 principal amount of unpaid bonds and is owed the sum of $273.30 unpaid interest and this count sought judgment in those amounts, plus interest thereon from the respective due dates of the bonds and interest payments. The complaint alleges in each count the issuance and ownership of the bonds and coupons, that they were not paid on the due dates thereof and that the amount thereof is due and owing. It is also alleged that the bonds

sued upon were dated in the year 1929 or 1930, bore interest at the rate of five and three-quarters per cent. or six per cent. per annum, and were due and payable in the years 1933, 1934, or 1935. (R. 4-7.)

After filing affidavits of merits (R. 7-8), the appellee, by notice of motion (R. 9) and supplemental notice of motion (R. 60), moved to strike the complaint for the following reasons:

> "1. The defendant, City of Asbury Park, has in operation a refunding plan and the claims of the plaintiffs are controlled by the terms and provisions of the said refunding plan.
>
> 2. The claim of the plaintiffs is controlled by the terms and provisions of N. J. S. A. 52:27-1 *et seq.* and N. J. S. A. 52:27-34, *et seq.*
>
> 3. The plaintiffs have not obtained permission of the New Jersey Supreme Court to institute the above entitled cause of action.
>
> 4. The complaint does not set forth a legal cause of action.
>
> 5. The complaint does not aver that plaintiffs have obtained permission of the New Jersey Supreme Court to institute the said cause of action."

In support of its motion, the appellee, over objection of appellants, offered the affidavits of Milford G. Farley, city manager of the City of Asbury Park (R. 9) and of Walter P. Haight, auditor and comptroller of the City of Asbury Park (R. 61). In the affidavit of Mr. Farley it is stated that on or about March 7, 1935, the City of Asbury Park was placed under the control of the Municipal Finance Commission pursuant to R. S. 52:27-1, *et seq.*; that the city

was then in default on the payment of interest on its bonded indebtedness; that on or about February 1, 1936, proceedings were instituted in the New Jersey Supreme Court pursuant to R. S. 52:27-34, *et seq.* for the adoption of a refunding plan for the refunding of $10,750,000 of outstanding bonds of the city, including the bonds of appellant; that said plan was approved by the Supreme Court on July 21, 1937, subject to the approval of creditors representing eighty-five per centum in amount of the indebtedness thereby affected; that the Municipal Finance Commission approved the plan on September 27, 1937; that on April 29, 1938, the necessary percentage of creditors having consented to the plan, it was finally approved by the Supreme Court of New Jersey in accordance with the provisions of R. S. 52:27-36; that the plan was put into operation on June 15, 1938, and has been in operation continuously since that time, bondholders who consented to the plan having exchanged their outstanding bonds for new bonds issued under the plan. It is further stated that it is the belief of the affiant that the plan is made binding upon all creditors by R. S. 52:27-37 and that the bonds of appellants are controlled by said plan, and that the appellants have no cause of action against the City of Asbury Park since they have not secured the permission of the Supreme Court to institute the present suit as required by R. S. 52:27-38 (R. 11). Copies of the refunding plan (Schedule A, R. 12) and of the order of the Supreme Court, dated April 29, 1938, approving the plan (Schedule B, R. 57) were attached to the affidavit.

The affidavit further states that under the terms of the refunding plan, the City of Asbury Park agreed to pay all interest on outstanding bonds at the contract rate up to

and including December 31, 1933, to pay all interest for the years 1934, 1935, 1936 and until December 1, 1937 at the rate of three per cent. per annum, and to issue bonds dated December 1, 1937, maturing in 1966, and bearing interest at the rate of four per cent. per annum to holders in exchange for their outstanding bonds (R. 11; Schedule A, R. 12).

The affidavit of Mr. Haight states that the bonds of appellants here sued upon were included in the refunding plan and that provisions were entered to refund the said bonds as provided therein (R. 61).

The answering affidavit of Moses W. Faitoute (R. 63), offered by appellants after their objection to appellee's use of affidavits in support of its motion was overruled, states that the appellants have never approved or consented to the refunding plan and that they have never appeared, by attorney or otherwise, in the proceedings in the New Jersey Supreme Court in connection with the same (R. 63). It is further stated that it is the belief of the affiant that the said refunding plan and the statute under which the same was adopted are not binding upon appellants and constitute no legal defense to their suit nor a basis for striking the complaint for the following reasons, *inter alia:* (1) said statute (R. S. 52:27-34 to 39) is unconstitutional since it impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States; (2) it deprives appellants of property without due process of law and denies appellants the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States; and (3) the statute was rendered nugatory and

inoperative and was superseded by the enactment by Congress of an amendment to the Federal Bankruptcy Act entitled "Provisions for the Emergency Temporary Aid of Public Debtors" approved by Act May 24, 1934, c. 345, 48 Stat. 798 as amended (hereinafter referred to as the first Federal Municipal Bankruptcy Act) and of an amendment to the Federal Bankruptcy Act entitled "Composition of Indebtedness of Local Taxing Agencies" approved by Act August 16, 1937, c. 657, 50 Stat. 654 as amended (hereinafter referred to as the second Federal Municipal Bankruptcy Act) (R. 64-65).

A hearing on the motion was had before Supreme Court Commissioner Joseph L. Smith on January 31, 1941, at which time the notices of motion and the affidavits referred to above were filed with the Court. Appellants objected at the hearing to the use by appellee of its affidavits in support of its motion as being procedurally improper, but, upon the said affidavits being received by the Court, offered the answering affidavit of Moses W. Faitoute, summarized above, on their behalf. The Court at that time heard the arguments of counsel as to the effect and validity of the statute and refunding plan referred to in the motion papers and affidavits.

On March 27, 1941, the New Jersey Supreme Court filed its opinion (R. 65) in which it concluded that the motion to strike the complaint should be granted.

The Court stated that it was not necessary to determine the constitutionality of R. S. 52:27-1, 34, *et seq.* insofar as the provisions thereof in abrogation of contractual rights of appellants were concerned. It held that, since R. S. 52:27-38 provides that the New Jersey Supreme Court

shall retain jurisdiction over the proceedings in connection with the refunding plan even after approval of the plan and further requires that the permission of the New Jersey Supreme Court be secured before a creditor may bring action, and since the New Jersey Supreme Court, in approving the plan, had expressly assumed and retained such jurisdiction for further proceedings, compliance with the provisions of that order and with the provisions of R. S. 52:27-38 would be required and the motion to strike the complaint granted since such permission had not been secured by appellants (R. 65-67).

Accordingly, on April 4, 1941, an order striking the complaint (R. 67) was signed by the Court and final judgment in favor of appellee dismissing the complaint with costs was entered on April 9, 1941 (R. 68).

Thereupon, your appellants filed their notice of appeal to the Court of Errors and Appeals of New Jersey, setting forth, in addition to certain objections, procedural and otherwise, not here involved, the following grounds (R. 1-3): (a) The New Jersey Supreme Court erred in granting the appellee's motion to strike the complaint in that the statute of the State of New Jersey (R. S. 52:-27-38) purporting to require the obtaining of permission from the New Jersey Supreme Court to bring said suit, and upon the basis of which the said motion was granted, is unconstitutional and void in that it is a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States, and in that such statute deprives the appellants of their property without due process of law and denies appellants the equal protection of the laws and abridges privileges and immunities of

citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States (R. 2); (b) The New Jersey Supreme Court erred in granting appellee's motion to strike the complaint in that Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey, providing for a compulsory composition of municipal bonds purporting to be binding on appellants and to wipe out the obligations sued on in the complaint herein, is unconstitutional and void in that it is a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and in that such statute deprives appellants of their property without due process of law and denies them the equal protection of the laws and abridges privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States (R. 2); (c) The Supreme Court erred in granting appellee's motion to strike the complaint in that Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey, set forth in appellee's motion papers providing for a compulsory composition of municipal bonds purporting to be binding on appellants and to wipe out the obligations sued on in the complaint herein was rendered nugatory and inoperative and was superseded by the enactment by the Congress of the United States of an amendment to the Federal Bankruptcy Act entitled "Composition of Indebtedness of Local Taxing Agencies", approved by Act of August 16, 1937, c. 657, 50 Stat. 654 as amended.

The New Jersey Court of Errors and Appeals affirmed the judgment of the Supreme Court dismissing the appellants' complaint (R. 74). The constitutional objections here

raised were considered in the Court's opinion (R. 69), and it was held that the statute, so construed as to permit a compulsory adjustment and composition of the debts of a municipal corporation, which debts were incurred before the enactment of the statute, was a valid exercise of the police powers and did not impair the obligation of appellants' contracts.

IV.

Specification of Errors.

1. The judgment of the Court of Errors and Appeals of the State of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the provisions of Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-34 to 52:27-39, and the adoption of a plan of composition by appellee in accordance therewith operated to prevent suit to enforce recovery on appellants' bonds and coupons is illegal and erroneous, because said statute was enacted and said plan was adopted, after the issuance of said bonds and coupons, and said appellants did not approve or consent to said plan nor did they appear in the proceedings in connection with the adoption of said plan. The statute as construed and applied by the Court of Errors and Appeals of the State of New Jersey is unconstitutional in that it impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States (R. p. 77).

2. The judgment of the Court of Errors and Appeals of the State of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the pro-

visions of Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-34 to 52:27-39, and the adoption of a plan of composition by appellee in accordance therewith operated to prevent suit to enforce recovery on appellants' bonds and coupons is illegal and erroneous, because said statute was enacted and said plan was adopted, after the issuance of said bonds and coupons, and said appellants did not approve or consent to said plan nor did they appear in the proceedings in connection with the adoption of said plan. The statute as construed and applied deprives appellants of property without due process of law, denies appellants the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States (R. p. 78).

V.

ARGUMENT.

Summary of Argument.

Point I. The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, since Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937), being a compulsory composition statute, is unconstitutional in that it impairs the obligation of contracts.

(a) The Composition Statute Impairs the Obligation of Contracts.

(b) The Composition Statute Cannot Be Sustained as an Emergency Measure Under the Police Power.

Point II. The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, since Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937), being a compulsory composition statute, is unconstitutional in that it deprives appellants of property without due process of law, denies appellants the equal protection of the laws, and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

POINT I.

The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, because Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937), a compulsory composition statute, is unconstitutional in that it impairs the obligation of contracts.

The Court of Errors and Appeals of New Jersey erred in affirming the granting of a motion to strike appellants' complaint, since the New Jersey compulsory composition statute, R. S. 52:27-34 to 52:27-39, inclusive, is unconstitutional as impairing the obligation of pre-existing contracts in violation of the Federal Constitution insofar as it is applied to appellants, who have not consented to the refunding plan sought to be imposed upon them under the

statute, and have not appeared in any of the proceedings in connection therewith. As a consequence, the refunding plan of the City of Asbury Park is not binding on non-consenting bondholders and neither the plan nor the statute constitute a bar to this suit.

(a) The Composition Statute Impairs the Obligation of Contracts.

Article I, Section 10 of the Constitution of the United States provides as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contracts * * *."

The composition statute here challenged was first enacted in 1933 (P. L. 1933, c. 331, p. 866) as a supplement to the Municipal Finance Commission Act and is now Article 7 of Chapter 27 of Title 52 of the Revised Statutes of 1937. It provides a scheme for the compulsory adjustment or composition of the obligations of municipalities in which the Municipal Finance Commission functions.

Sections R. S. 52:27-34 through R. S. 52:27-36 provide for the adoption of a refunding plan adjusting the claims of creditors of a municipality after approval by a justice of the New Jersey Supreme Court and by eighty-five per cent. in amount of the creditors affected thereby. Before giving his approval to the plan, the justice of the Supreme Court must determine that the municipality is unable to pay its obligations in full, that the composition is measured by the capacity of the municipality to pay, that it is in the interests of all the creditors affected thereby and that it is not detrimental to other creditors.

R. S. 52:27-37, which provides that the plan shall be binding upon all creditors included therein, reads as follows:

> "The plan of adjustment so authorized and approved shall forthwith and without further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations, or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order."

R. S. 52:27-38, requiring consent of the Supreme Court before the institution of suit under the plan and forbidding suit on the old obligations of the creditor, provides:

> "In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition."

The provisions of R. S. 52:27-39 are not here material.

Upon examination of the statute in the light of Article I, Section 10 of the Constitution of the United States and the cases construing that Section, its invalidity becomes apparent. The purpose and effect of the statute is to permanently wipe out the old obligations of a municipality

and to compel non-assenting creditors to accept what the refunding plan gives them. It is in effect a bankruptcy statute, granting a discharge to the municipality by forbidding suit upon the old obligations refunded under the plan.

Under the terms of the refunding plan adopted by appellee on April 29, 1938, these appellants, whose bonds were issued in 1929 and 1930, long before the statute was passed or the plan adopted, are forced to accept new bonds maturing in 1966 and bearing interest at the rate of four per cent. per annum in place of their obligations which had fallen due before the plan was adopted and which bore interest at the rate of either five and three-quarters per cent. or six per cent. per annum. Moreover, they are required to accept interest on their obligations at the rate of three per cent. per annum rather than at the contract rate or the legal rate for the years 1934, 1935, 1936 and for the first eleven months of the year 1937. (See Complaint, R. 4-7; Affidavit of Milford G. Farley, R. 11; Schedule A, Refunding Plan, R. 13, 14.)

It cannot be doubted that the statute permits the most flagrant kind of impairment of the obligation of contracts. It goes far beyond the impairment of remedies to enforce the contract; it strikes down the entire obligation by substituting a new one of entirely different terms without the consent of the creditor. It is submitted that the statute is unconstitutional beyond a shadow of a doubt and this conclusion is supported by a multitude of judicial decisions in both the federal and state courts running back over a period of one hundred and twenty-five years.

Two very recent decisions of the United States Supreme Court are directly in point in condemning such legislation

as violative of the Federal Constitution. *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513 (1936); *United States* v. *Bekins*, 304 U. S. 27 (1938). The Court in those cases was concerned with the constitutionality of the first and second Federal Municipal Bankruptcy Acts respectively. The first act was held unconstitutional in the *Ashton* case; the second act was held valid in the *Bekins* case. But in both decisions the Court expressly stated that such legislation, effecting a compulsory composition of the indebtedness of a municipal corporation, was beyond the constitutional powers of a state to enact.

In the *Ashton* case, a five to four decision, both the majority by Mr. Justice McReynolds and the minority by Mr. Justice Cardozo explicitly so held, citing as authority the leading case of *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819). Mr. Justice McReynolds said (298 U. S. 513, at p. 531):

> "The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.' This she may not do under the form of a bankruptcy act or otherwise. Sturges *v.* Crowninshield, 4 Wheat. 122, 191."

Mr. Justice Cardozo said (298 U. S. 513, at p. 534):

> "Nor was there hope for relief from statutes to be enacted by the states. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. Sturges *v.* Crowninshield, 4 Wheat. 122. Relief must come from Congress if it is to come from any one."

In the *Bekins* case, a six to two decision with Mr. Justice McReynolds and Mr. Justice Butler dissenting, Chief Justice Hughes, writing for the majority, said (304 U. S. 27, at pp. 53, 54):

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief.
>
> • • •
>
> "The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation • • • The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue."

The Court in the *Bekins* case relied heavily upon the report of the Judiciary Committee of the House of Representatives supporting the validity of the federal act under consideration in the case. That report revealed that one of the reasons for the federal act was the fact that state statutes such as the one here in question are forbidden by the limitations of the Federal Constitution. The Committee, as quoted by the Court, said (304 U. S. 27, at p. 51):

> " 'There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of existing contracts. Therefore, relief must come from Congress, if at all.' "

These very recent opinions by the Supreme Court of the United States would seem to be sufficient authority in them-

selves to strike down the New Jersey legislation here involved, but brief reference will be made to a few of the earlier and underlying authorities upon which this conclusion is based.

The great body of law which has developed under the contracts clause of the federal constitution stems from the leading case of *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819). There, Chief Justice Marshall held that while a state could pass a bankruptcy law so long as Congress had not acted within its constitutional powers on the subject, the state act could not impair the obligation of contracts, and that a state insolvency act of New York which discharged a contract made before the statute was passed did impair the obligation of contracts and was void. The principle of the case has been followed for more than one hundred and twenty years without repudiation. *Ogden* v. *Saunders*, 12 Wheat. 213 (1827); *Baldwin* v. *Hale*, 1 Wall. 223 (1863); *Denny* v. *Bennett*, 128 U. S. 489, (1888); see *International Shoe Co.* v. *Pinkus*, 278 U. S. 261 (1929).

The principle has been applied in innumerable cases involving attempts by state legislatures to alter or repudiate the obligations contained in municipal bonds. It is significant, however, that in no case considered by the United States Supreme Court has any state legislature purported to go so far as the New Jersey act here in question. A reference to two decisions holding unconstitutional state acts of this general nature is pertinent. *Wolff* v. *New Orleans*, 103 U. S. 358 (1880); *Louisiana* v. *Pilsbury*, 105 U. S. 278 (1881). In these cases the municipality had issued bonds. Taxes were considered too high so a plan was prepared providing for the issuance of new bonds to replace

the old ones using a lower interest rate and a maturity date to be determined by lot. In order to coerce the bondholders to accept the new plan, the State of Louisiana passed a statute limiting the amount of taxes to be levied for debt service and prohibiting proceedings to enforce the old obligations. The statute was held unconstitutional in each case as impairing the obligation of contracts.

In the *Pilsbury* case, Mr. Justice Field condemned the legislation in language particularly appropriate to the New Jersey act under discussion (105 U. S. 278, at p. 300):

> "If the provisions of this act nullifying the pledges of the Act of 1852 are valid, the consolidated bonds are virtually destroyed; no taxation is allowed to raise funds for them; their payment, therefore, would be so uncertain as to render them practically valueless. The chance with premium bonds offered in their place of a favorable turn of the wheel in a lottery would be a poor substitute for the levy of an annual tax for the payment of interest and principal. We shall not waste words upon the scheme thus developed to evade the just obligations of the city. Notwithstanding the declaration in its preamble, that the act seeks from the creditors the indulgence necessary 'for the public well-being and the maintenance of the public honor,' it is, so far as the consolidated bonds are concerned, tainted with the leprosy of repudiation. It says to the creditors: 'Take these premium bonds, and trust for payment within fifty years to your fortune in the lottery we offer; no other way is left open to obtain a possible payment. No tax can be levied for your benefit. No compulsory writ can issue from the courts. Take these bonds or take nothing.' The primal duty of the

> city authorities to fulfill punctually their obligations and maintain good faith is thus proclaimed to be no duty at all."

The State of Mississippi has passed legislation similar in purpose and scope to the New Jersey composition statute relied upon here and in the case of *Pryor* v. *Goza*, 172 Miss. 46 (1935), the Supreme Court of Mississippi held such legislation unconstitutional as violating the contracts clauses of both the federal and state constitutions. This case, therefore, is directly in point in support of appellants' contentions.

The statute there involved applied to drainage districts which had issued bonds and provided that, if upon a valuation of the assets of the district, it should be found that such value was less than the indebtedness of the district, liquidation certificates should be issued to bondholders in proportion to the reduced value of their bonds. The effect of the scheme was that the indebtedness of the district was scaled down to the extent of the reduction in value of the assets and the bonds wiped out as obligations. The substituted liquidation certificates, it was provided, could be made due and payable at different dates from the original bonds and when discharged the bonds of the district could not be made subject to further taxes to pay the balance due on the bonds. The Mississippi Supreme Court held that the statute attempted to provide a scheme of bankruptcy for a political subdivision of the state and that, as a state bankruptcy law discharging liability on contracts entered into before its passage, it impaired the obligation of contracts and was void. The language of the Court is peculiarly applicable to the case at bar (172 Miss. 46, at pp. 53, 54):

"Would the enforcement of the statute impair the obligation of the contract evidenced by the bonds held by appellees? We think it clear that that question must be answered in the affirmative. Where a statute makes the contract more beneficial to one party and less to the other than its terms provide, its obligation is impaired; releasing only a part of the obligation impairs the contract. A law which enlarges, abridges, or in any substantial manner changes the intention of the parties as expressed in the contract impairs the obligation. A law dispensing with any substantial force of the contract imposing conditions not expressed, or dispensing with those expressed, is a violation of its obligation.

* * *

"A state bankruptcy law discharging liability on contracts entered into before its passage impairs the obligation of such contract and is void. Sturges *v.* Crowninshield, supra; Ogden *v.* Saunders, supra; Denny *v.* Bennett, 128 U. S. 497, 9 S. Ct. 134, 32 L. Ed. 491. The bonds here involved were issued and sold in 1924 and the statute enacted in 1932. The contract clause of the Federal Constitution applies, not only to state action impairing the obligation of contracts of persons, partnerships, and corporations engaged in private business, but to contracts by the state itself and all of its political subdivisions, including counties, municipalities, and other taxing districts. New York Guaranty & I. Co. *v.* Board of Liquidation, 105 U. S. 622, 26 L. Ed. 1106; Hall *v.* Wisconsin, 103 U. S. 5, 26 L. Ed. 302; State of Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448; Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705; State of Mississippi *v.* Miller, 276 U. S. 174, 48 S. Ct. 266, 72 L. Ed. 517.

> "We conclude that the statute is violative of the contract clause of both the state and Federal Constitutions, and therefore void."

In *County of Los Angeles* v. *John E. Rockhold*, 3 Cal. (2d) 192 (1935), the Supreme Court of California dealt with the constitutionality of the Refunding Special Assessment Bond Act of 1933 which permitted the adoption of a refunding scheme by a political subdivision of the state upon consent of seventy-five per cent. of the bondholders thereof. The scheme provided for reduction of interest and principal of outstanding bonds. The Court held that the scheme was unconstitutional as impairing the obligation of contracts since no provision was made to protect dissenting bondholders. As to the impairment of contract obligations, the Court said (3 Cal. (2d) 192, at p. 210):

> "The second ground of unconstitutionality urged by respondent is that by the 1933 act the contract of the bondholders has been impaired. As already stated, the act provides that the refunding may take place when 75 per cent of the holders of outstanding bonds consent. Under the refunding scheme, the nature of the security is changed and the principal and interest of the bonds are reduced. It is plain, therefore, that the obligation of the existing bonds is impaired. As to the 75 per cent or more bondholders who consent, there is, of course, no complaint. But as to the non-consenting bondholders, including those who are absent and those incapacitated or incompetent, who may hold up to 25 per cent of the bonds, there is an obvious impairment, if their bonds are canceled and they are forced to take new bonds with a different security, in a lesser amount, and bearing a reduced interest, or if their security is lessened."

* * * * * *

"Counsel for petitioner and *amici curiae* in its behalf, in oral argument and in their final briefs, concede that no change can be made in the bondholders' contract, unless 100 per cent of the bondholders consent thereto, or unless some provision is made for all dissenting bondholders. *There can be no doubt that it is indispensable, from a constitutional standpoint, so far as bondholders are concerned, that either 100 per cent consent to the change or that the dissenting bondholders be so taken care of that no impairment of their contract ensues.**

* * * * * *

"With this concession made by petitioner, the problem becomes one of interpretation rather than constitutionality. They admit that the proceedings cannot be completely effective without the consent of 100 per cent of the bondholders, and all they demand is that those proceedings be initiated when the requisite 75 per cent has been obtained. They admit that no bond can be canceled, or the obligation represented by it impaired in any way, unless the consent of the holder be first obtained, or unless some adequate means of payment be made.

"We are of the opinion that in spite of the concessions made by petitioner, and giving the act the broadest and most liberal interpretation, we cannot hold that the present act adequately safeguards the rights of dissenting bondholders. *Any act, to meet constitutional tests as far as the bondholders are concerned, must provide either for the consent of all the bondholders, or the rights of the dissenting bondholders must be protected.*"

Prior to the instant decision of the Court of Errors and Appeals, the rulings of the New Jersey courts had been

* All italics ours unless otherwise noted.

entirely in accord with the views of the United States Supreme Court and of sister states.

Thus, the New Jersey courts had held, even before the decision in *Sturges* v. *Crowninshield, supra,* that a state insolvency law is void as impairing the obligation of contracts if applied to pre-existing obligations. *Vanuxem* v. *Hazlehursts,* 4 N. J. L. 192 (Sup. 1818); *Olden* v. *Hallet,* 5 N. J. L. 466 (Sup. 1819); *Ballantine* v. *Haight,* 16 N. J. L. 196 (Sup. 1837).

In the leading case of *Rahway* v. *Munday,* 44 N. J. L. 395 (E. & A. 1882), the Court of Errors and Appeals dealt with an early attempt in New Jersey to render the obligation of municipal bonds impotent by hindering legislation, and Chief Justice Beasley there held that a state statute limiting the method of enforcing municipal bonds was unconstitutional as an impairment of the obligation of contracts and as depriving a party of a remedy for enforcing a contract.

A classic statement of the doctrine of impairment was delivered by Mr. Justice Depue in *Baldwin* v. *Flagg,* 43 N. J. L. 495 (Sup. 1881). In holding that a statute requiring foreclosure of a mortgage before instituting suit on a bond was unconstitutional and void as to antecedent obligations, he said (43 N. J. L. 495, at p. 503):

> "The obligation of a contract is synonymous with the ability to enforce its performance. It consists in the power and efficacy of the law which applies to and enforces performance of it, or an equivalent for non-performance. Thus, if a party contracts to pay a certain sum on a certain day, the contract binds him to perform it on that day, and this is its obligation. 2 *Story on Const.,* § 1378. It is per-

> fectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it, and the manner or degree in which this change is effected can in no respect influence the conclusion. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation. 2 *Story on Const.*, § 1385. 'The obligation of a contract, in the constitutional sense,' says Mr. Justice Field, 'is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. * * * Any authorization of the postponement of payment, or of the means by which such postponement may be effected, is in conflict with the constitutional inhibition.' *Louisiana* v. *New Orleans*, 102 U. S. 206.
>
> "A legislative act which enlarges the time for the performance of an existing contract for a definite or indefinite period, however short, would plainly impair the obligation of the contract."

To similar effect is the decision of the same Court in the recent case of *Vanderbilt Trustee in Liquidation* v. *Brunton Piano Co.*, 111 N. J. L. 596 (E. & A. 1933). In the case of *State ex rel. Phelps* v. *Fort Lee*, 14 N. J. Misc. 895 (Sup. 1936), it was held that rights to priority of payment of tax revenue and anticipation notes issued by a municipality could not be destroyed by the Municipal Finance Commission Act or other subsequent legislation. Mr. Justice Bodine said (14 N. J. Misc. R. 895, at p. 904):

"The obligations were issued under legislative authority by force of which the holders thereof had a contractual obligation, which entitled them to payment either out of revenues received, but absolutely from taxes to be collected in the fourth year after issue. *Possessed of such an obligation no change thereof can be effected by the Municipal Finance Commission act or subsequent legislative enactment.*"

It is apparent, therefore, that the New Jersey Court of Errors and Appeals, in the present case, has rendered a decision not only contrary to those of the federal and other state courts, but at variance with the long-established course of New Jersey law.

Under the cases in this Court, and those of other states, it is clear that the composition statute, R. S. 52:27-34 to R. S. 52:27-39, inclusive, is void as in violation of the Federal Constitution since it impairs the obligation of contracts as applied to the bonds here sued upon.

The invalidity of the composition statute cannot be affected by the fact, suggested in the opinion of the Court of Errors and Appeals (R. 73), that in the absence of the statute a bondholder could enforce payment of his judgment only by the discretionary writ of *mandamus* and that the New Jersey Supreme Court, in considering the granting of such writ, would see to it that no irreparable public injury was done. Even if it be assumed that the courts of New Jersey could, by judicial decision, effectively deprive bondholders, such as the appellants, of any means of enforcing the obligations owned by them, it is settled beyond the need of argument that the State of New Jersey cannot, by legislative enactment, constitutionally diminish the obligation of

such bondholders' contracts, made prior to the passage of the legislation. See *Douglass* v. *Pike County*, 101 U. S. 677 (1879); *Cross Lake Club* v. *Louisiana*, 224 U. S. 632 (1912); *Kryger* v. *Wilson*, 242 U. S. 171 (1916). Clearly, for example, an attempt by the legislature to deny access to the writ of *mandamus* would violate Article I, Section 10 of the Constitution. See *Louisiana* v. *New Orleans*, 102 U. S. 203 (1880). The manner in which the courts might judicially limit the use of the writ of *mandamus*, therefore, has no bearing on the unconstitutionality of the composition statute as applied to appellants' bonds.

Attention should be directed to R. S. 52:27-38, heretofore quoted, which provides that no creditor whose claim shall be included in an approved composition shall bring suit to enforce his claim except with the permission of the Supreme Court and then only to enforce the rights given to him by the composition. A mere reading of the statute discloses that appellants could never secure the consent of the Supreme Court to this action, since it is based upon the bonds alleged to have been refunded under the plan adopted by appellee and is not brought to enforce rights given by the plan. The statute does not merely provide a stay of remedy for a limited period of time. It is *perpetual* in its terms and expressly deprives a holder of the only means of legal enforcement of his bonds on default. It is clearly unconstitutional under the authorities cited above. See *Louisiana* v. *Pilsbury*, 105 U. S. 278 (1881); *Borough of Fort Lee* v. *United States*, 104 F. (2d) 275 (C. C. A. 3rd, 1939).

Furthermore, since Section R. S. 52:27-37 of the act is clearly unconstitutional in that it makes the refunding plan

binding on non-assenting creditors and compels the acceptance of new obligations in place of the old, it cannot be doubted that the whole act must fall. The applicable rule was stated by the Court of Errors and Appeals of New Jersey in *Johnson* v. *State*, 59 N. J. L. 535 (E. & A. 1896), (at page 539):

> "It is undoubtedly elementary law that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail."

Accord: *Dorchy* v. *Kansas*, 264 U. S. 286 (1924); *Lynch* v. *United States*, 292 U. S. 571 (1934); *Riccio* v. *Hoboken*, 69 N. J. L. 649 (E. & A. 1903); *Crater* v. *County of Somerset*, 123 N. J. L. 407, 411 (E. & A. 1939).

Applying this rule to the composition statute, it is clear that the very heart of the statute is the provision making compositions under the statute compulsory and that the legislature would never have enacted the law without it. It follows that the whole act falls and that R. S. 52:27-38 would therefore be invalid for this reason alone, were it not otherwise objectionable.

(b) The Composition Statute Cannot Be Sustained as an Emergency Measure under the Police Power.

Both the Court of Errors and Appeals and the appellee have laid great emphasis on the argument that the composition statute here involved is constitutional as emergency legislation under the police power of the state. The Court of Errors and Appeals relied on *Hourigan* v. *North Bergen Township*, 113 N. J. L. 143 (E. & A. 1934) which case, in turn, rested upon the decision of this Court in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934).

It is clear that the present statute does not meet the tests required by the *Blaisdell* case for a valid exercise of the police power in the form of emergency legislation. In that case the Court sustained the validity of the Minnesota mortgage moratorium act, as against the claim that it impaired the obligation of contracts, holding that it was a proper exercise of the police power of the state in a period of public emergency. The legislation sustained, however, was temporary in operation, postponing mortgage foreclosure sales and extending the period of redemption for a limited period of time specified in the act upon the condition that the mortgagor pay a reasonable rental.

Chief Justice Hughes pointed out that the contracts clause of the Federal Constitution must be construed in harmony with the reserved police power of the state and that the existence of a public emergency might warrant an interference with contract rights under that power. He was careful to point out, however, that emergency does not

remove all constitutional restraints, stating (290 U. S. 398, at p. 439):

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. *This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.* But it does not follow that conditions may not arise in which a *temporary restraint* of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."

In concluding that the statute was valid, the Court said (290 U. S. 389, at pp. 445, 447):

> "In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.
>
> "The conditions upon which the period of redemption is extended do not appear to be unreasonable. * * * As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency

judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.

* * *

"The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts."

The *Blaisdell* case, therefore, far from supporting appellee's position, demonstrates that the composition statute is invalid.

Subsequent decisions of this Court, considering the doctrine of the emergency powers, clearly show that a statute, such as this, which permanently destroys contract rights, cannot be sustained as an emergency measure under the police power.

In *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426 (1934), this Court held that a state statute exempting, without limitation or restriction, all moneys received under an insurance policy from liability for the payment of the debts of the recipient thereof was an unconstitutional impairment of contract obligations as applied to preexisting debts. It was argued that the act was valid as an emergency measure

under the *Blaisdell* case. Chief Justice Hughes, delivering the opinion of the Court, reviewed fully the effect of the decision in the *Blaisdell* case and concluded that the statute in question could not be sustained thereunder since not temporary in operation or reasonably limited to the emergency. He said (292 U. S. 426, at pp. 432-434):

> "The Legislature sought to justify the exemption by reference to the emergency which was found to exist. But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief.
>
> "We held in *Home Building & Loan Asso.* v. *Blaisdell, supra*, pages 434, *et seq.*, that the constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the State, in the exercise of its essential reserved power, to protect the vital interests of its people. • • • But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.
> • • •
>
> "In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction."

In *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935), a statute revising the method of collecting delinquent taxes by extending for a period of years the time for redemption after a tax sale and reducing penalties for non-payment of taxes was held unconstitutional as an impairment of the obligation of contracts as applied to public improvement bonds issued prior to the enactment of the statute. The *Blaisdell* case was relied upon in support of the validity of the act which contained a declaration that the act was designed to meet an existing public emergency. As to this point, Mr. Justice Cardozo said (295 U. S. 56, at p. 63):

> "Upholders of the challenged acts appeal to the authority of *Home Building & Loan Asso.* v. *Blaisdell, supra*, the case of the Minnesota moratorium. There for a maximum term of two years, but in no event beyond the then existing emergency, a court was empowered, if there was a proper showing of necessity, to stay the foreclosure of a mortgage, but only upon prescribed conditions. 'The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.' 290 U. S. at p. 445. None of these restrictions nor anything approaching them, is present in this case. . . . Not Blaisdell's case, but Worthen's *W. B. Worthen Co.* v. *Thomas, supra*, supplies the applicable rule."

See also *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U. S. 124 (1937).

It should be noted that the doctrine of the *Blaisdell* case was well established when the Supreme Court of the United States held in the Federal Municipal Bankruptcy Act cases (*Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513 (1936) and *United States* v. *Bekins*, 304 U. S. 27 (1938)) that a compulsory state municipal bankruptcy act such as that here involved is unconstitutional as impairing the obligation of contracts if applied to preexisting obligations.

Prior to the present case, New Jersey had accorded full support to the doctrine of the United States Supreme Court cases. See *Vanderbilt Trustee in Liquidation* v. *Brunton Piano Co.*, 111 N. J. L. 596 (E. & A. 1933); *Fidelity Union Trust Co.* v. *Bryant*, 14 N. J. Misc. 243 (Sup. 1936); *State ex rel. Phelps* v. *Fort Lee*, 14 N. J. Misc. 895 (Sup. 1936). Even the case of *Hourigan* v. *North Bergen Township*, 113 N. J. L. 143 (E. & A. 1934) lends no support to the appellee's contentions.

In the latter case, the Court of Errors and Appeals of New Jersey, by a seven to six vote, upheld the constitutionality of the stay provisions of the Municipal Finance Act, R. S. 52:27-32.1 and 33 as emergency measures under the police power. The case did not involve a refunding plan. The composition features of the statute were not involved and, in fact, were not even enacted at the time of the argument in the *Hourigan* case. The stay provisions there sustained were limited in duration to the period when the Municipal Finance Commission was operating in the community and a substituted remedy was given during that time. But it is doubtful that even the stay provisions of the statute can constitutionally be sustained as reasonable emer-

gency measures. Other courts, in similar situations, have taken a contrary view. See *Borough of Fort Lee* v. *United States*, 104 F. (2d) 275 (C. C. A. 3rd, 1939); *Sovereign Camp. W. O. W.* v. *Wilentz*, 23 F. Supp. 23 (D. C. N. J., 1938), *appeal dismissed*, 306 U. S. 573 (1939); *Waterville Realty Corp.* v. *City of Eastport*, 136 Me. 309 (1939).

In view of the rulings of this Court it is obvious that the composition statute cannot be sustained as an emergency act under the police power. It provides for a compulsory, *perpetual* prevention of the enforcement of appellants' obligations now long due and for the forced substitution of new and different obligations in their stead not enforcible for many years. These, certainly, are not reasonable conditions appropriate to an emergency and the statute must therefore be held to be an unconstitutional impairment of the obligation of contracts.

One further point should be noted in this connection. Even if the Court should determine that the composition statute was a reasonable emergency measure when enacted, the act cannot now be sustained if the emergency has passed. It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934).

It is to be noted that the Municipal Finance Commission ceased to function in Asbury Park on December 10, 1938, only a few months after the adoption of the refunding plan here involved and long prior to the institution of the suit at bar. No municipality other than Asbury Park has adopted a plan under the statute. The composition statute as enacted (P. L. 1933, c. 331, p. 866) contains no

declaration of public emergency which is stated to require a bankruptcy act of this nature. The statement of the Supreme Judicial Court of Maine in *Waterville Realty Corp. v. City of Eastport*, 136 Me. 309 (1939), which held unconstitutional the staying of suits against a municipality while the Municipal Finance Commission was functioning therein, is therefore pertinent (136 Me. 309, at p. 319):

> "• • • The entitling of the act as one 'Creating a Board of Emergency Municipal Finance', without expression of facts in a preamble constituting a public emergency, does not compel a conclusion that there was a public emergency rather than one solely private affecting, for instance, only certain municipalities. We do not take judicial notice of the fact that more than a very few cities and towns in this state were so badly involved financially when this statute was enacted that there was 'an urgent public need' for the enactment of such legislation.
>
> "But assuming a public emergency then to have existed, there is nothing in this record to show, nor do we take judicial notice of the fact, that such an emergency had not ceased when this action was brought. Did we validate this act as public emergency legislation, it could have efficacy only as long as such an emergency continued. *Home Building & Loan Asso.* v. *Blaisdell*, supra."

It is therefore submitted that the composition statute is void as an unconstitutional impairment of the obligation of contracts. It follows that the refunding plan adopted by the City of Asbury Park cannot be held binding upon appellants who have not consented thereto. It also follows that it is no defense to this action that appellants have failed to secure the permission of the New Jersey Su-

preme Court to the institution of this suit as required by R. S. 52:27-38. Since that section of the statute is invalid, the order of the Supreme Court retaining jurisdiction over further proceedings in connection with the plan is a nullity, *State* v. *Guida*, 119 N. J. L. 464 (E. & A. 1938); *In re Rose*, 122 N. J. L. 507 (Sup. 1939); *Central R. R. Co.* v. *State Board of Assessors*, 75 N. J. L. 771 (E. & A. 1908), and neither the requirements of the statute nor the order of the Court can be held to impose conditions upon appellants' right to sue.

It is obvious, therefore, that the Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint and in so doing infringed the constitutional rights of appellants under Article I, Section 10 of the Constitution of the United States.

POINT II.

The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, since Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) being a compulsory composition statute, is unconstitutional in that it deprives appellants of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The rights acquired by the appellants upon purchase of their bonds were contract rights and vested in nature.

Lynch v. *United States,* 292 U. S. 571 (1934). Appellants were entitled to be paid upon the dates stipulated and in full, including interest at the rates provided. Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, as construed by the Court of Errors and Appeals of New Jersey, denies to appellants the rights acquired at the time of the making of their contracts and endeavors to substitute an obligation entirely different in nature without the consent of the appellants. It not only materially alters the methods of enforcement but changes the terms of the obligation itself. It seeks to require both the acceptance of new bonds maturing in 1966 and of interest rates far lower in amount.

The denial of a vested right under a contract, by a statute subsequently enacted, is a deprivation of property without due process of law. The statute here involved, therefore, not only impairs the obligation of appellants' contracts in violation of Article I, Section 10 of the Constitution of the United States, but deprives appellants of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. *Lynch* v. *United States,* 292 U. S. 571 (1934); *Bradley* v. *Lightcap,* 195 U. S. 1 (1904); *Houston and Texas Central Railway Company* v. *Texas,* 170 U. S. 243 (1898); 12 Am. Jur., Constitutional Law, § 657.

Conclusion.

In concluding, it should be pointed out that the Asbury Park refunding plan will not be upset if appellants prevail in this appeal. A holding that the composition statute is invalid and that the plan is not binding upon appellants cannot in any way impair the integrity of the refunding bonds which have been issued in the past or may be issued in the future to assenting bondholders. The validity of these bonds in no way depends upon the composition statute, which merely deals with the question as to whether non-assenting bondholders may be compelled to accept the new bonds in place of the old. The new bonds were issued under the authority of other provisions of the Municipal Finance Commission Act of undoubted constitutionality (R. S. 52:27-14 to 24, inclusive), and are clearly valid obligations of the City. Moreover, as appears from appellee's affidavits filed in this cause, the vast majority of the bondholders of the City of Asbury Park have consented to the refunding plan and accepted the new bonds. (R. 10, 61) Since they have so consented, they may not now or later challenge the validity of the new bonds or the refunding plan in any way. *Shepherd* v. *Mount Vernon Trust Co.*, 269 N. Y. 234 (1935); *In re City of West Palm Beach, Fla.*, 96 F. (2d) 85 (C. C. A. 5th, 1938).

Further, a decision of this Court in favor of the appellants can have little, if any, effect on state refunding plans throughout the nation. The passage of federal legislation upon the subject has terminated the utilization of such plans under state municipal insolvency statutes.

For the reasons herein urged, it is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey, affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, should be reversed.

Respectfully submitted,

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On the Brief:

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APPENDIX.

Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey.

52:27-34. **Petition by creditors; plan of adjustment or composition; parties; notice.** Upon the verified petition of any creditors of a municipality in which the commission shall function, made on behalf of themselves and all other creditors of the municipality, for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the supreme court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the supreme court.

The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the supreme court by its justice may direct. Any creditor of the municipality may appear and assert his rights.

Source, L. 1933, c. 331, § 1, p. 866, suppl. to L. 1931, c. 340, p. 830.

52:27-35. **Allegations in petition.** In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation, that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors

affected thereby, and is not detrimental to other creditors of the municipality.

Source. L. 1933, c. 331, § 1, p. 866, suppl. to L. 1931, c. 340, p. 830.

52:27-36. **Approval by supreme court justice of plan of adjustment or composition; findings.** In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby and by the municipality and the commission, the supreme court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

Source. L. 1933, c. 331, § 2, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-37. **Approved plan binding on all creditors; substituted obligations.** The plan of adjustment so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations,

or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

Source. L. 1933, c. 331, § 3, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-38. **Continuance of stay of proceedings against municipality; action by creditor to enforce claim restricted.** After the institution of any proceeding provided for by this article and pending the determination thereof, the supreme court by a justice thereof may by order continue the stay provided by sections 52:27-32.1 and 52:27-33 of this title.

In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition.

Source. L. 1933, c. 331, § 4, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-39. **Reduction in principal of outstanding notes or bonds prohibited.** Notwithstanding any provisions of this article the commission shall not approve any adjustment or composition, or plan presented pursuant to this article, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality.

Source. L. 1933, c. 331, § 5, p. 868, suppl. to L. 1931, c. 340, p. 830.